**RATUS MESRA SDN BHD**

**v.**

**SHAIKH OSMAN MAJID & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-20-1997]
2 JUNE 1999

***TORT:*** *Defamation - Fair comment - Alleged libellous article in response to plaintiff's misleading advertisement on investment scheme - Article commenting on need for rules for such schemes without insinuating anything about plaintiff's intentions - How to determine whether article defamatory - Whether necessary to consider entire article - Whether comments reasonable and honestly made - Whether article a fair comment on matter of public interest*

***TORT:*** *Defamation - Malice - Allegation of malice to defeat defence of fair comment - Whether plaintiff must serve reply particularising facts showing malice - Whether failure to do so leaves defence of fair comment unrebutted - Rules of the High Court 1980, O. 78 r. 3(3)*

***TORT:*** *Malicious falsehood - Claim for libel and malicious falsehood - How to establish malicious falsehood - Whether plaintiff bears burden of proving falsity of statement complained of - Whether plaintiff's claim for malicious falsehood ought to fail if plaintiff's claim in libel fails*

The plaintiff placed an advertisement in the newspaper inviting the public to invest in the breeding of ostriches. Subsequently, an article entitled "Ostrich farms should provide prospectus" was published by the defendants and based on the contents of this article, the plaintiff claimed damages for libel as well as for malicious falsehood. The plaintiff contended that the words used in the article were understood to mean that the public or potential investors must act with caution in respect of the plaintiff's dubious advertisement, that the advertisement was deceiving, that there must be legal constraints on the plaintiff's freedom to trade, that investors should be suspicious of the plaintiff's motives, that the plaintiff's scheme was a trap set for investors and that the plaintiff's scheme was a sham and nothing less than an unscrupulous scheme. The defendants submitted that the words in the article were not defamatory of the plaintiff, that the article was a fair comment upon a matter of public interest and that there was no proof of express malice shown to negative the defence of fair comment. The defendants also denied the claim for malicious falsehood.

**Held:**

**[1]** The test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning which a reasonable man would understand. For the purpose of considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article.

**[1a]** A reading of the entire article would convey to an ordinary reader that investment in ostrich farming is risky and can result in losses as well as profits. It will also alert the reader to the fact that any potential investor must exercise caution when investing in ostrich farming as these investments are akin to investing in companies which offer shares for sale to the public. The article also pointed out that for the same reasons why companies offering shares for sale to the public are required to issue a prospectus accompanying the offer, a similar requirement should be imposed on ostrich farms which invite the public to invest. The court found that the alleged innuendoes could not have the meaning and intention attributed to the article as contended by the plaintiff.

**[2]** The plaintiff's action in placing the advertisement inviting members of the public to invest in ostriches renders the plaintiff's activities in ostrich farming a matter of legitimate public interest. The defendants, by the article, merely questioned the right of the promoters of this type of venture, including the plaintiff, to freely solicit investments without even giving the general public a guideline by way of prospectus. The defendant's comments on the need to introduce rules or require prospectus from these companies were perfectly reasonable and were honestly made. Thus, the article was a fair comment on a matter of public interest. Further, the advertisement placed by the plaintiff was a misleading advertisement and therefore clearly warranted a fair comment by the newspapers as a matter of public interest.

**[3]** At no time during the proceedings in court or in any of the articles published by the defendants had it been suggested that the plaintiff was out to cheat or swindle investors, that it was a liar or that the plaintiff's investment scheme was no more than a trap.

**[4]** In an action for libel or slander, where a defendant pleads fair comment and the plaintiff intends to defeat this defence by alleging that the defendant was actuated by express malice, pursuant to O. 78 r.3(3) of the Rules of the High Court 1980, the plaintiff must serve a reply giving particulars of the facts and matters from which the malice is to be inferred. In the instant case, the plaintiff failed to comply with the said provision and thus the defence of fair comment stands unrebutted.

**[5]** Unlike a cause of action in defamation, a plaintiff in an action for malicious falsehood bears the burden of proving the falsity of the statement complained of. Since the court found against the plaintiff's claim in libel, logically the court ought to dismiss the claim for malicious falsehood. In any event, the plaintiff failed to prove the falsity of the statements referred to in its statement of claim.

*[Claim dismissed.]*

**Case(s) referred to:**
*Broadway Approvals Limited & Anor v. Odhams Press Ltd & Anor (No 2) [1965] 1 WLR 805* ***(refd)***
*Hunt v. Star Newspaper Co Ltd [1908] 2 KB 319* ***(refd)***
*Institute of Commercial Management United Kingdom v. New Straits Times Press (Malaysia) Bhd [1993] 2 CLJ 365* ***(refd)***
*Joshua Benjamin Jeyaretnam v. Goh Chok Tong [1989] 3 MLJ 1* ***(foll)***
*Lee Kuan Yew v. Derek Gwyn Davis & Ors [1990] 1 CLJ 583* ***(refd)***
*Lewis & Anor v. Daily Telegraph Ltd [1963] 2 All ER 151* ***(refd)***
*The New Straits Times Press (M) Bhd v. Airasia Bhd [1987] 1 MLJ 36* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 84-90
Defamation Act 1957, ss. 6, 9
Rules of the High Court 1980, O. 78 r. 3(3)

**Other Source(s) referred to:**
*Clerk & Lindsell on Torts*, 17th edn, para 22.03
*Gatley on Libel and Slander*, 9th edn, para 3.12
*New Shorter Oxford English Dictionary 1993*, edn, vol 1, p 1410

*For the plaintiff - Amarjeet Singh (BL Kerk with him); M/s Zubeda & Amarjeet*
*For the defendants - Lorraine Cheah; M/s Shearn Delamore & Co*

*Reported by S Dharmendran*

**JUDGMENT**

**RK Nathan J:**

***The Claim***

The plaintiff's claim against the defendants is for damages for libel as well as for malicious falsehood, together with interest on any damages awarded and costs in respect of words published in an article under the heading:

Ostrich farms should provide prospectus

appearing in the issue of the "New Sunday Times" dated 23 March 1997.

***Facts***

The plaintiff is in the business of ostrich farming having begun the said business in December 1995 after obtaining pioneer status on 22 August 1996. The 1st defendant was the writer of the said article. The 2nd and 3rd defendants were at all material times the assistant editor and publisher of the said newspaper.

The plaintiff had advertised its business in "The Malay Mail" on Wednesday, 19 March 1997, which advertisement had appeared before the publication of the said article.

***The Defence***

The defences raised were that the words in the article were not defamatory of the plaintiff, that the article was a fair comment upon a matter of public interest, namely the issue concerning advertisements to the public by promoters of ostrich breeding and whether these attempts to solicit investments from the general public should be regulated, and that there was no proof of express malice shown to negative the defence of fair comment. The defence also denied the claim for malicious falsehood.

***The Article***

The entire article consists of 45 paras. The relevant portions of the article relied on by the plaintiff are paras. 1-5, 7-10, 41 and 45. I have not therefore in this judgment found the need to reproduce the entire lengthy article, except for the paragraphs relied on.

Para 1:
An unobtrusive and relatively small advertisement inviting investment in ostriches was perched in a corner of an English daily last Wednesday.

Para 2:
It made no claims on returns on investments. Rather it only mentioned that each breeding bird would cost RM10,000. By inference, a breeding pair would cost RM20,000. The total amount includes the management package. No other charges would be levied.

Para 3:
The advertisement also said replacement birds would be provided free for up to 24 months after the initial investment. These were the only details in that advertisement.

Para 4:
But past advertisements made outrageous claims of as much as 50 per cent annual returns on investments after three years and more if investors chose to sell the eggs or the chicks.

Para 5:
The question is whether these promoters of ostrich breeding should be freely allowed to solicit investments. Should they not be subjected to some sort of rules?

Para 7:
Thus, investors like you and I should shy away from participating in schemes that promote the breeding of such rarities.

Para 8:
... A study by the Ministry showed that the claims of the promoters were 'not always true'.

Para 9:
The promoting farm might sell more of these big flightless birds than they really have.

Para 10:
The breeder pair that you believed you had bought might have already been sold to other investors who, like you, plonked down wads of cash galvanised by the desire to garner hefty returns on investments.

Para 41:
... But there remain some of these farms which merely want to promote investment in ostriches as does the advertisement cited earlier.

Para 45:
Given this backdrop, it is inexplicable why the Registrar of Companies does not require promoters of ostrich farms to issue a prospectus that lists the past performance, potential future gains as well as the risks involved for potential investors.

***The Plaintiff's Advertisement***

'INVEST IN OSTRICHES'

SUNGKAI - PERAK

"Special Introductory Offer"

* BREEDER BIRDS 10,000 RM
* NO MORE MONEY TO PAY
* ALL INCLUSIVE MANAGEMENT PACKAGE
* FREE REPLACEMENT BIRDS UP TO 24 MONTHS
* FARM INSPECTION WELCOME

PLEASE CONTACT:-

RATUS MESRA SDN. BHD.
TEL 03-7168 773 OR 010-2243605
FAX 03-7168775 OR 012-2016624
ASK FOR MR. MURRAY OR MR. BOYD

***Findings Of The Court***

**Were The Words Defamatory Of The Plaintiff?**

The plaintiff's case was that the said article referred to and was understood to refer to the plaintiff on the basis that the plaintiff was at the material time in the ostrich farming business and further, on the basis that the plaintiff had indeed made an advertisement in "The Malay Mail" and that the 1st defendant (who was DW2) had admitted referring to the said advertisement in his article and had also admitted to PW1, the Managing Director of the plaintiff, when he telephoned the 1st defendant, that the said article referred to the plaintiff. This of course was denied by the 1st defendant. The plaintiff urged upon me not to read the article in isolation (as the plaintiff had by itself chosen to do) but to read the whole article as the test is an objective one. If this is the plaintiff's case then the plaintiff has in my view failed to state so in its pleadings. The plaintiff deliberately chose certain paragraphs only from the article which the plaintiff described in its statement of claim as being "the defamatory words". I agree that the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (see *Gatley on Libel and Slander* 9th edn para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. In fact at para. 2.38 Gatley says that "In the case of a newspaper article or television or radio broadcast, the defendant is entitled to have read as part of the plaintiff's case, the whole of the piece from which the alleged libel is extracted".

What the 1st defendant had done was to reproduce in paras. 12-17 of the article, a report published on 29 December 1996 by the "Guardian" newspaper in England which said *inter alia* that "2,700 people put nearly £22 million (RM86 million) in the Ostrich Farming Corporation lured by the promise of annual returns in excess of 50 per cent". The article pointed out that that worked out to an average of £1,800 per investment and that the said company went into liquidation in April 1997 and that after the firm had ceased trading, it was discovered that nearly a third of the ostriches were sold to non-existent investors.

In paras. 6-11 of the said article, the 1st defendant referred to a public statement made by the then Deputy Agricultural Minister and reported in the local newspapers entitled "Avoid rushing into ostrich farming public told". The said news report which was an agreed and admitted document found in CABD 63 quoted the Deputy Agricultural Minister as having said that several advertisements in local dailies recently claimed high returns in ostrich farming to attract individual investors. He was further quoted to have said that ostrich farming was viable for companies since they have large funds but not for individuals. He then said:

> So I advise individuals to check carefully on the claims by ostrich farming promoters before parting with their money.

It is a fact that the plaintiff had placed a small advertisement in "The Malay Mail" as stated in para. 1 of the article. Whilst the word "small" could relate to the size of the advertisement, I take it that a reasonable man would relate the word "small" to inadequate details. Whilst the choice of the words "perched in a corner of an English daily" might seem offensive, I take it as a parody, a legalistic licence given to writers to indulge in metaphoric expressions to enliven an otherwise humdrum report.

Paras 2 and 3 of the article are mere factual statements of the advertisement. It is obvious that para. 4 relates to past advertisements, namely, the advertisement in the "Guardian" and there is also the reference to the claim of 50% annual returns as stated in the "Guardian". The only tangible complaint that I see can be made against the 1st defendant is the juxtapositioning of para. 4 immediately after para. 3. But that is where the objective approval of a reasonable man, in interpreting whether a statement is defamatory or not, comes to play. Obviously the plaintiff has made no claims to any previous advertisements and to my mind, reading the entire article, I cannot by any stretch of the imagination accept that the words published were defamatory of the plaintiff.

It is also my judgment that the words are not defamatory in the sense as pleaded by the plaintiff. The plaintiff pleaded that the words in their natural or ordinary and/or inferential meaning meant or were understood to mean that the public or potential investors must *inter alia* act with caution in respect of the plaintiff's dubious advertisement, that the advertisement was deceiving, that there must be legal constraints on the plaintiff's freedom to trade, that investors should be suspicious of the plaintiff's motives, that it was a trap set for investors that the plaintiff's scheme was a sham and nothing less than an unscrupulous scheme.

In *Lewis & Anor v. Daily Telegraph Ltd* [1963] 2 All ER 151 the House of Lords held that where an extended defamatory meaning of words admittedly libellous in their ordinary meaning was put forward by a plaintiff, the defendant was entitled to a ruling whether the words were capable of bearing that particular extended meaning. With this guideline and having read the entire article I am of the view that reading this article would convey to an ordinary reader that investment in ostrich farming is risky and can result in losses as well as profits. It will also alert the reader to the fact that any potential investor must exercise caution when investing in ostrich farming, as these investments are akin to investing in companies which offer for sale to the public, shares in a company. The article also pointed out that for the same reasons why companies offering shares for sale to the public are required to issue a prospectus accompanying the offer, a similar requirement should be imposed on ostrich farms, which invite the public to invest. I also find that the alleged innuendoes cannot have the meaning and intention attributed to the article as contended by the plaintiff.

***Fair Comment***

In respect of this defence, the plaintiff relied upon the Privy Council decision in *Joshua Benjamin Jeyaretnam v. Goh Chok Tong* [1989] 3 MLJ 1 wherein their Lordships held that in order for the defendant to succeed in his defence of fair comment four elements must be established, namely:

(i) The words complained of are comment, although they may consist or include inferences of fact;

(ii) The comment is on a matter of public interest;

(iii) The comment is based on facts; and

(iv) The comment is one which a fair-minded person can honestly make on the facts proved.

I am in total agreement. The concept of freedom of speech which is covered by the defence of fair comment has been recognised by our then Supreme Court in *The New Straits Times Press (M) Bhd v. Airasia Bhd* [1987] 1 MLJ 36 SC. In that case the respondent claimed damages against the appellants for libel alleged to be contained in articles published in "The Sunday Mail", a paper also produced by the appellants. The appellants relied on both fair comment and justification in the public interest. The libel was alleged to be contained in an article headed "danger in model job" and another article headed "cops check model job" published in two issues of "The Sunday Mail". The respondent having filed the writ for libel obtained an injunction to restrain the appellants from further publishing the same articles. An *ex parte* order

was granted to the respondent. The appeal to the judge to set aside that order was dismissed. The pleadings in that case refer to the two articles that were alleged to be libellous. As for the first article headlined "Danger in Model Job", the respondent alleged that the appellant falsely and maliciously wrote and published the article which was meant and was understood to mean that the respondent was a disreputable and non-existent company and that its directors/employees were immoral, lewd and promiscuous people by seeking to offer employment to a girl with the intention of procuring her for immoral purposes. With reference to the second article headed "Cops Check Model Job" the respondent alleged that the appellant falsely and maliciously published the article which was meant and was understood to mean that the respondent and/or its executives were elusive, shady and dangerous characters whom members of the public must be protected from.

For the purposes of considering the case before me, I shall revert to that part of the judgment in the *The New Straits Times* which deals with fair comment on matters of public interest. In allowing the appeal the then Supreme Court held that when fair comment on a matter of public interest is raised as a defence, the court will not grant an injunction in defamation actions. Whilst I agree that this case relates primarily to the right or otherwise of a trial judge to grant injunctive relief, I am emboldened by the views of the highest court that in applying the principle of allowing the defence of fair comment the court is thus placing greater emphasis on freedom of speech relating to the freedom of the press when comparing and balancing the damage or wrong, if any, that can be caused to the reputation of a single individual or a company who/which if wronged, can be adequately compensated by way of damages. Subject to the caveat that if one transgresses the borderless line of freedom of speech and enters the uncharted mine-field of malicious libel or slander, one is liable to face a suit for defamation, the court must, in order to ensure that there is no such transgression, stand as a silent sentinel, ever vigilant, never indolent, as a bulwark towards freedom of speech.

To my mind clearly the defendants are entitled to the defence of fair comment. The direct and pointed headline of the article reads "Ostrich farms should provide prospectus" and it is important also to note, that this article appears under the "Business" section of the said newspapers indicating that it was mainly directed towards those interested in reading of the business opportunities as presented in this country and as published by the 3rd defendant. In para. 5 of the said article the writer clearly comments on a matter of public interest. The plaintiff is a limited company and has even obtained pioneer status which means that it has received the encouragement and the blessing of the government to encourage investment in this venture. The defendants merely questioned the right of the promoters of this type of venture,

including the plaintiff to freely solicit investments without even giving the general public a guideline by way of prospectus. The bare advertisement I have reproduced is so inadequate that any right-minded person would demand further details before investing in such a venture. The 1st defendant then relates what happened in England. He has in my view a duty to the general public to point out what has happened in England in such similar ventures. It is my judgment that the article is a fair comment by the 1st defendant on a matter of public interest.

Further, to show how important this matter is to the general public, even the Deputy Agricultural Minister had made comments and had advised the general public "to check carefully on the claims by ostrich farming promoters before parting with their money". In fact, in *Broadway Approvals Limited & Anor v. Odhams Press Ltd & Anor (No. 2)* [1965] 1 WLR 805 the Court of Appeal held that an honest and fair opinion on a matter of public interest was not actionable even though it be untrue and fail of justification and therefore, provided that the facts were established and the comment was fair, a plea of fair comment could succeed though a plea of justification failed. In the case before me, there is no plea of justification. However, it is my finding that the plaintiff's action in placing the advertisement and which advertisement invites members of the public to invest in ostriches, renders the plaintiff's activities in ostrich farming, a matter of legitimate public interest.

The defendants rely on s. 9 of the Defamation Act 1957 which states as follows:

> In an action for libel or, slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

The defendants have proven the fact of publication of the advertisement. It is true that the said advertisement provides no details of investment returns nor does it explain how the breeder birds could be sold or the fact that the RM10,000 fee only covers the cost of managing the birds until it is 24 months old. After the 24 months, the plaintiff does not say what would happen. Would it charge further fees or a commission to sell the birds and if so how much of commission. This is what the 1st defendant was commenting on when he insisted on the need of a prospectus to guide investors. This comment of the 1st defendant seems legitimate and warranted when considering the evidence of PW1, the Registrar of Companies, who testified that his Registry is concerned with the large investments that were obtained from the public. In fact he testified that he was studying "as to whether Ostrich Investment Scheme comes within the meaning of s. 84 of the Companies Act 1965". In

fact ss. 84-90 of the Companies Act 1965, *inter alia,* require a company, which issues, invites or offers to the public any interest as defined in s. 84, to first issue a statement in writing in connection with the same, where this statement will be deemed to be a prospectus issued by the company.

The word "invest" as used in the advertisement would connote the meaning that by expending money or effort in something, from which a return or profit is expected (see the *New Shorter Oxford English Dictionary 1993* edn vol 1, p. 1410). In its advertisement the plaintiff has referred to "Breeder Birds 10,000 RM" and during cross-examination PW1, the Australian Managing Director of the plaintiff, admitted that the use of the word "breeder" suggests that the birds are used for breeding. In the circumstances, it is my judgment that it is perfectly reasonable therefore for anyone reading the advertisement to believe that the plaintiff was indeed inviting him to invest in ostriches for the purpose of breeding. However, from PW1's evidence it is clear that the ostriches reach maturity only after 24 months and that the fee of RM10,000 only covers the purchase and care of the ostriches for the said 24 months. It only became evident under cross-examination that after 24 months the purchaser would then have to enter into another service contract if he wished the plaintiff to continue to look after the bird and this is for an indefinite period, only to be mutually cancelled by either party giving one month's notice to the other.

In other words it now becomes apparent that after paying RM10,000 for one ostrich, an investor may have to:

(1) find another ostrich owner to breed;

(2) pay further fees to breed the bird after 24 months;

(3) pay for the cost of feeding the chicks; and

(4) pay a commission to sell the bird.

All these factors were never disclosed in the advertisement. It is my judgment therefore that the 1st defendant's comments on the need to introduce rules or to require prospectus from these companies are perfectly reasonable and are honestly made. I also find that at no time during the proceedings in court or in any of the articles published by the defendants has it been suggested that the plaintiff was out to cheat or swindle investors, that it was a liar or that the plaintiff's investment scheme was no more than a trap set for investors as alleged in the statement of claim.

All that an ordinary reader would infer from the article and the intention of the 1st defendant is that there should be some regulations imposed on companies offering these schemes to the public to ensure that the potential

investors are given adequate information in order to make an informed decision about their investment.

The plaintiff had relied heavily on *Institute of Commercial Management United Kingdom v. New Straits Times Press (Malaysia) Bhd* [1993] 2 CLJ 365; [1993] 1 MLJ 408 to argue that it is the duty of the defendants to indicate what are facts and what are comments. I have stated in my judgment that the facts relied on by the defendants are as set out in the advertisement of the plaintiff and arising therefrom the 1st defendant made the comments. There is no fear in my mind that, as relied on by the learned judge in *Institute of Commercial Management* when he relied on the observation of Fletcher Moulton LJ in *Hunt v. Star Newspaper Co Ltd* [1908] 2 KB 319 that the comments in order to be justifiable as fair comment were so mixed up with the facts that "the reader cannot distinguish between what is report and what is comment ...". Relying on the case of *Lee Kuan Yew v. Derek Gwyn Davis & Ors* [1990] 1 CLJ 583; [1990] 1 MLJ 390 the plaintiff submitted that its advertisement was a common advertisement and that it cannot be said to be "unobtrusive in the sense of being a discreet one". The very fact that the plaintiff had failed to provide necessary details as to what happens to the bird after the initial 24 months and the words "No More Money To Pay" boldly stated in the advertisement are indicative of the plaintiff's attempt to discreetly keep the innocent investor out of reach of knowledge that he would be tying capital down to this investment after the initial 24 months.

In fact the conduct of the 1st defendant is commendable. If not for the freedom of the press to unemotionally present the true picture many genuine investors can be caught up in misleading and manipulative enterprises. I am satisfied that the advertisement as placed in "The Malay Mail" was a misleading advertisement and therefore clearly warranted a fair comment by the newspapers as a matter of public interest. For what then is the use of newspapers if not to disseminate news and information to the public. And it is no doubt because of this onerous task that the newspapers are vested with the heavy burden of being honest, fair and true and not to give a biased, lop-sided or slanted view.

The plaintiff contends that by failing to give consideration to the words "Farm Inspection Welcome", the defendants had failed to state the full facts of the advertisement. To a reasonable, fair-minded reader, the words "Farm Inspection Welcome" merely means that the investor is welcome to visit the farm and see the birds. Since telephone numbers and a facsimile number had been given, there can always be the possibility of investors buying the birds through the phone or the fax. The plaintiff had failed to state in the said advertisement that further details would be provided at the farm. This would have enticed only genuine investors and to my mind it is not impossible for the plaintiff

to have considered the fact that since the farm was in Sungkai, Perak, not many investors from Kuala Lumpur or down south would have been tempted to visit the farm if the plaintiff had stated that further details would be available at the farm.

***Malice***

It is the plaintiff's submission that if the defence of fair comment is made out, the plea of malice, raised by the plaintiff would demolish the defence of fair comment. The plaintiff contends that there was express or actual malice on the ground that the defendants were indifferent to the truth or otherwise of the words complained of. The plaintiff takes this stand because prior to writing the article DW2 did not carry out any investigation into the plaintiff nor did he interview PW1, that DW2 knew that no other article had referred to the plaintiff and that DW2 need not have referred to the plaintiff in his article.

I reject this plea of malice. I am satisfied that no purpose would have been served by investigating the plaintiff. The 1st defendant merely relied on the plaintiff's advertisement. That is precisely what the plaintiff had expected from investors. Only a very prudent and heavy investor would make a search or investigate before entering into a venture. But this advertisement is considered a relatively small venture in respect of one individual. But collectively and in large numbers, the proverb - "Little drops of water make the mighty ocean", would literally plump up the plaintiff with cash from investors allured by the fascination of an investment in an ostrich farm or setting the investor's heart upon a flight of fancy emboldened by yet another proverb - "Counting one's chicken before they are hatched". I have watched the 1st defendant give evidence. His answers were assertive, non-evasive, clear and candid. As it is important to know the state of the mind of the writer in considering express malice I am satisfied after seeing and hearing the 1st defendant that he was genuinely motivated by a desire to make a fair comment upon a matter of public interest.

In any case I ought not to consider at all this plea of malice. *Gatley on Libel and Slander* 9th edn states at para. 33.24:

> Allegation of express malice. Where privilege (or fair comment) is raised as a defence it is common for the plaintiff to allege by way of reply, in order to defeat such a defence, that the defendant was actuated by express malice. In such circumstances a defendant would want to give evidence to rebut the allegation of malice. The nature of such evidence will be governed by the case advanced by the plaintiff in relation to malice.

However O. 78 r. 3(3) of the Rules of the High Court 1980 (the RHC) reads as follows:

> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

I have perused the Bundle of Pleadings. The plaintiff has clearly failed to comply with O. 78 r. 3(3) of the RHC. In the circumstances, the defence of fair comment stands unrebutted.

***Malicious Falsehood***

It is the plaintiff's submission that based on his earlier submission on libel he has also made out a case for malicious falsehood "on the basis that the offending words in the article are false and that there was malice on the part of the defendants". Since I have found against the plaintiff in his claim in libel, logically therefore I ought to dismiss this claim for malicious falsehood. Whilst counsel for the plaintiff might be blessed with the art of packing within a sentence the phosphorescence of a page, alas the task of a judge is not so easy. In a field of learning so illimitable as law it becomes the lot of the judge to consider in fairness to the plaintiff whether he has indeed made out a case under this head.

Defamation protects the plaintiff's reputation, while malicious falsehood protects the plaintiff's interest in his property or trade (see *Clerk & Lindsell on Torts* 17th edn para. 22.03).

To establish this tort the plaintiff will have to prove:

(a) That the defendant has published about the plaintiff words which are false.

(b) That they were published maliciously.

(c) That special damage has followed as the direct and natural result of their publication. The common law position is now altered by s. 6 of the Defamation Act 1957 which states as follows:

> (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage -
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication."

See *Clerk & Lindsell on Torts* (17th edn para 22.10.)

I have already dealt with issues (a) and (b) earlier. However it is necessary for me to point out that unlike a cause of action in defamation, the burden of proof is on the plaintiff in an action for malicious falsehood to prove the falsity of the statement complained of. Also unlike defamation, there is no question of innuendoes or "ordinary and natural meaning" being attributed to the statement complained of. *Clerk and Lindsell* at para. 22.12 says "unless he shows falsehood the plaintiff shows no case to go to the jury". Therefore it is clear that the statement published must stand on its own and the plaintiff has to prove the falsity of the statement published. The plaintiff has failed to prove the falsity of the statements referred to in the statement of claim.

As I find that the plaintiff had failed to prove its case both in libel and in malicious falsehood I dismiss the claim with costs. Even if I had found for the plaintiff I would have directed assessment of damages to have been done by my senior assistant registrar. I have therefore not assessed any damages even though this action stands dismissed.